

FILED

APR 20 2011

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY W. JOHNSON,

Plaintiff,

v.

R. W. FRITZ, et al.,

Defendants.

No. C 10-01673 JW (PR)

ORDER DENYING MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT

(Docket No. 12)

Plaintiff, a California inmate at the Salinas Valley State Prison in Soledad, filed a pro se civil rights complaint under 42 U.S.C. § 1983, challenging the conditions of his confinement. The Court dismissed the complaint with leave to amend. (Docket No. 5.) On February 18, 2011, the Court found the amended complaint, liberally construed, stated cognizable claims and ordered service on defendants Fritz and Hedgpeth and dismissed the claims against defendant Cate. (Docket No. 8.) On March 3, 2011, Plaintiff filed a motion for leave to file a second amended complaint. (Docket No. 12.)

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners

1 seek redress from a governmental entity or officer or employee of a governmental entity.
2 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and
3 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief
4 may be granted, or seek monetary relief from a defendant who is immune from such
5 relief. Id. at 1915A(b)(1),(2).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person
7 acting under the color of state law committed a violation of a right secured by the
8 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). Pro se
9 pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
10 699 (9th Cir. 1990).

11 B. Plaintiff's Claims

12 In his first amended complaint, Plaintiff claims that on December 24, 2009, he was
13 retaliated against by defendant Correctional Officer R. W. Fritz and placed in
14 administrative segregation ("ad-seg") for filing an inmate grievance alleging misuse of
15 force against Defendant Fritz. (Am. Compl., Attach. at 1.) Plaintiff alleges that
16 defendant Fritz also unlawfully strip searched him, and threatened to keep him in ad-seg
17 unless he withdrew the grievance. (Id.) Plaintiff alleges that he refused, and that as a
18 result he was retained in ad-seg for seven months thereafter. Plaintiff claims that his
19 placement in ad-seg was unjustified and based on false information. (Id. at 2.) Liberally
20 construed, these claims are cognizable under § 1983 as violations of plaintiff's First
21 Amendment right against retaliation, right to due process, and Fourth Amendment right to
22 bodily privacy. The Court also found cognizable Plaintiff's claim against defendant
23 Hedgpeth as sufficient to state a claim under § 1983 for supervisory liability as the
24 warden of SVSP for the wrongful actions of defendant Fritz.

25 In his second amended complaint, plaintiff seeks to add defendants T. Selby, B.
26 Martinez, P. Nickerson, B. Hedrick, G. Biaggini, Dr. Worrington and Ms. Park, A.
27 Meden, W. Muniz, Dr. Card and G. Ramirez to this action, alleging that they retaliated
28 against him and conspired with defendants Fritz and Hedgpeth to unlawfully retain him in

ad-seg for seven months following defendant Fritz's actions as alleged above. (SAC at 3, 6.)

A plaintiff may amend the complaint once as a matter of course within 21 days after serving it. Fed. R. Civ. P. 15(a)(1)(A). But if the complaint requires a responsive pleading, a plaintiff may amend the complaint 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. Id. at (a)(1)(B). In all other cases, a plaintiff must obtain the defendant's consent or leave of court to amend a complaint. Id. at (a)(2). Plaintiff filed his second amended complaint on March 3, 2011. On March 14, 2011, the summonses were returned executed on defendants Fritz and Hedgpeth. (Docket Nos. 14 & 15.) A responsive pleading has not yet been filed by defendants.

Although plaintiff's claims against new defendants arise from and are related to the claims in his first amended complaint, the claims are deficient as they are conclusory and lack factual support. Plaintiff makes blanket claims that defendants "agreed and acted to intentionally" against his interests but provides no material facts to support these allegations. (SAC at 6.) Conclusory allegations of a conspiracy which are not supported by material facts are insufficient to state a claim under § 1983. Woodrum v. Woodward County, 866 F.2d 1121, 1126 (9th Cir. 1989). Furthermore, plaintiff must allege that a constitutional right was violated – conspiracy, even if established, does not give rise to liability under § 1983 unless there is such a deprivation. Id. Accordingly, the motion for leave to file a second amended complaint is DENIED. In the interest of justice, plaintiff shall be given leave to amend to attempt to allege sufficient facts to support a cognizable claim against any defendants he wishes to add to this action.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff's motion for leave to file a second amended complaint is DENIED without prejudice. Within **thirty (30) days** of the date this order is filed, plaintiff may

1 file a third amended complaint to correct the deficiencies discussed above. The third
2 amended complaint must include the caption and civil case number used in this order and
3 the words "THIRD AMENDED COMPLAINT" on the first page and the case number for
4 this action, Case No. C 10-01673 JW (PR). Because an amended complaint completely
5 replaces any previously filed complaint, plaintiff must include in it all the claims he
6 wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff
7 may not incorporate material from previously filed complaints by reference.

8 If plaintiff desires not to file an amended complaint and proceed solely on the
9 cognizable claims against defendants Fritz and Hedgpeth the first amended complaint, he
10 shall file notice accordingly, and the action shall proceed in accordance with the Court
11 Order filed on February 18, 2011, (Docket No. 8).

12 2. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
13 Court informed of any change of address by filing a separate paper with the clerk headed
14 "Notice of Change of Address." He must comply with the Court's orders in a timely
15 fashion or ask for an extension of time to do so. Failure to comply may result in the
16 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

17 The clerk shall enclose two copies of the court's form complaint with a copy of
18 this order to plaintiff.

19 This order terminates Docket No. 12.

20
21 DATED: April 15, 2011


JAMES WARE
United States District Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY W. JOHNSON JR.,
Plaintiff,

Case Number: CV10-01673 JW

CERTIFICATE OF SERVICE

v.

R.W. FRITZ, et al.,

Defendants.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 4/20/11, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Anthony Wayne Johnson F-58411
Salinas Valley State Prison
P. O. Box 1050
Soledad, Ca 93960

Dated: 4/20/11



Richard W. Wieking, Clerk
By: Elizabeth Garcia, Deputy Clerk